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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

Nos. 75-1409

ST. REGIS PAPER COMPANY,

Petitioner,

vs.

THOMAS R. McMILLEN, JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI.

HARRY SHRIMAN,
HERMAN FELDMAN,
111 West Washington Street,
Chicago, Illinois 60602,
Attorneys for Respondent.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

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The petition presents two main arguments for review of the orders below. The first argument is that the District Court did have jurisdiction on the basis of diversity of citizenship, and that the Court erred in remanding the cause. The second is that Section 1447(d), in barring review of an order remanding a removed case, deprives petitioner of the equal protection of the laws, in violation of the Constitution.

I.

THE ORDER REMANDING THE CAUSE IS NOT REVIEWABLE.

Petitioner first argues extensively that the District Court erred in finding lack of diversity jurisdiction, and in finding that the

removal was not filed in apt time. It is thus clear that the Court found that the removal was both improvident and without jurisdiction.

Even if there were any merit in the contention that the District Court erred in its findings, Section 1447(d) bars review of the order remanding the case.

At this point, petitioner relies on *Thermtron Products, Inc., et al.* v. *Hermansdorfer*, U. S. Law Week, January 20, 1976, Volume 44, No. 28. The petition (p. 18) states, on the basis of this case, that "a Court of Appeals does have jurisdiction to rectify an erroneous remand that has been made on grounds other than the specific grounds set forth in the statute". However, the decision also expressly confirms and lets stand the "well-established general rule that Section 1447(d) and its predecessors were intended to forbid review by appeal or extraordinary writ of any order remanding a case on the grounds permitted by the statute." Since the order of remand was expressly based on statutory grounds, because of untimely and improvident removal and absence of Federal jurisdiction, Section 1447(d) bars review of any kind.

II.

PETITIONER HAS NOT BEEN DEPRIVED OF ANY CONSTITUTIONAL RIGHTS.

Under the powers granted by Article III of the Constitution, pertaining to the establishment of United States Courts, Congress, by the enactment of Section 1447(d), has prevented review of orders of remand, in a case such as is now before this Court.

Petitioner now for the first time raises the issue of the constitutionality of that section, arguing that petitioner is deprived of the equal protection of the law. Aside from the fact that petitioner did not raise the issue in the Court of Appeals, the iden-

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tical argument was made and rejected in *Baines* v. *City of Danville*, 337 F. 2d 579, 597-598 (1964); *certiorari denied*, 381 U. S. 939, 14 L. Ed. 2d 702.

III.

THIS COURT SHOULD EXERCISE ITS DISCRETION TO ASSESS DAMAGES FOR DELAY.

Rule 56 of this Court provides that where there appears to be no ground for granting the writ of certiorari, this Court, in an appropriate case, may assess reasonable damages for delay. The pending petition appears to present such an appropriate case.

The original suit in the State Court was filed by plaintiffs below in January, 1974, against Michigan Carton Co., which filed a petition for removal on the alleged ground of diversity of citizenship. The cause was then remanded for want of such diversity. Then, after extensive discovery procedures in State Court, St. Regis filed a motion to be substituted as sole defendant therein, by reason of its merger with Michigan Carton Co. The motion was denied. Then petitioner, St. Regis (which is not and never has been a party to the suit) filed a second petition for removal, contending that the merger had created the necessary diversity. The cause was again remanded. Then followed the petition for writ of mandamus, which was denied. By reason of the present petition for certiorari, on motion of St. Regis all proceedings in the State Court have been stayed by that Court, pending this Court's ruling on the present petition.

For the purpose of this part of our response, it seems pertinent to emphasize the following: The merger occurred on December 31, 1974. The second petition for removal was filed on July 7, 1975, more than 6 months after the alleged fact giving rise to the necessary diversity—and thus more than 5 months after the 30-day period prescribed by the statute. Though the removal would have been without jurisdiction in any case, there was nothing in the way of its being filed at any time after December

31, 1974, within the period prescribed by law. Yet petitioner blames the trial judge for the delay, because the judge "delayed any ruling" on the motion of St. Regis to be substituted as sole defendant (Petition, p. 13). We submit that this history and such arguments are relevant in determining whether this is an appropriate case for the application of Rule 56.

The District Court decision (petition, p. 36) calls attention to the fact that "defendant flew in the face of an existing and valid decision of the Circuit Court of Cook County, after having been rebuffed once before on the same point". Here it may similarly be said that petitioner now seeks to fly in the face of the Constitution, the Code, and clearly relevant case law.

We believe the record reveals a pattern of tactics which make this an appropriate case for the assessment of damages for the resulting delays, in keeping with the objectives of the rule.

CONCLUSION.

The order of the District Court, remanding the cause, was correct and proper. The denial of the petition for writ of mandamus was likewise correct and proper. In addition, since the cause was remanded by reason of lack of Federal jurisdiction and because the removal was filed too late, the statute precludes review of the order.

In view of the record of delay caused by St. Regis, this Court should, pursuant to Rule 56, adjudge reasonable damages for such delay.

Respectfully submitted,

HARRY SHRIMAN,
HERMAN FELDMAN,
111 West Washington Street,
Chicago, Illinois 60602,
Attorneys for Respondent.